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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL DWIGHT RAVEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN W. SMITH
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713-651-5151

Counsel of Record for Petitioner Michael Dwight Raven

Of Counsel:

FULBRIGHT & JAWORSKI L.L.P.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether conviction for a nine year conspiracy to distribute cocaine should be allowed to stand, despite a six year hiatus in conspiratorial activity during which the defendant engaged in only sporadic buy-sell transactions with a single individual.

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PETITION FOR WRIT OF CERTIORARI

CITATION OF OPINIONS AND ORDERS

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix A hereto.

The order of the Fifth Circuit denying Mr. Raven's Petition For Rehearing is reproduced as Appendix B hereto.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on August 24, 1999. *United States v. Raven*, No. 97-40635. A petition for rehearing was denied on October 12, 1999. This Court has jurisdiction to review on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, section 9, clause 3:

> No Bill of Attainder or ex post facto law shall be passed.

21 U.S.C. § 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 3282

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

A. Background Facts

In January 1997, Petitioner Michael Raven was convicted with three co-defendants (Smith, Frazier, and Lewis) of participating in a nine-year conspiracy to distribute cocaine in Texas City, Texas. Mr. Raven was also convicted of four substantive drug trafficking offenses, each of which occurred in 1995. The conspiracy count of the indictment charged Mr. Raven with participating in a drug conspiracy beginning "on or about the middle of 1987 continuing until the date of this indictment" (*i.e.* November 1995).

The evidence at trial centered mostly on two periods of time – the late 1980s (1987-89) and mid-1995. The 1987-89 evidence consisted mostly of co-conspirator and cooperating witness testimony regarding miscellaneous drug transactions in the Texas City neighborhood where Mr. Raven resided. According to this testimony, Mr. Raven supplied crack cocaine to several individuals, including co-defendants Smith and Frazier. Frazier and Smith occasionally acted as intermediaries and helped set up transactions between Mr. Raven and other customers.

Frazier also sold crack to other individuals who never dealt directly with Mr. Raven.

The mid-1995 evidence consisted primarily of testimony from law enforcement agents and undercover operatives, who initiated an undercover investigation of Raven under the aegis of the Drug Enforcement Administration and the Galveston County Narcotics Task Force. This investigation resulted in two crack purchases from Raven, in which co-defendant Smith acted as intermediary. Undercover agents also arranged two drug purchases from co-defendant Lewis, in which co-defendant Frazier also participated. Raven was not involved in either of those transactions. In July 1995, a DEA confidential informant referred to as the "Colombian" posed as a major South American drug figure and attempted to lure Raven and the other co-defendants into purchasing a large quantity of cocaine. Although several meetings occurred, this deal was never consummated. Finally, in October 1995, a search warrant executed at Raven's residence yielded two kilos of cocaine powder and a small quantity of crack cocaine. Drug paraphernalia was also found in the house, together with two loaded pistols.

Between 1989 and May 1995, however, the record is largely silent. The only evidence of drug activity by Raven was a series of one-on-one sales to an individual named Roussell in 1993 or 1994.

Mr. Raven timely moved for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which motion was denied. The district court entered judgment on the jury verdict, and imposed a sentence of

420 months, based on a presentencing report which relied heavily on drug quantities from the late 1980s' activity.

B. Fifth Circuit Opinion

Raven challenged his conspiracy conviction on appeal, arguing *inter alia* a fatal variance between the single nine year conspiracy charged, and the two smaller conspiracies, six years apart, arguably established by the evidence.

The Fifth Circuit rejected this appeal. Erroneously applying a plain error standard of review,[1] the court in a *per curiam* opinion concluded that Raven supplied crack cocaine for redistribution continuously from 1987 to 1995. No specific evidence was cited in support of this conclusion. The court did offer the following rationale, however:

> In cases involving drug distribution conspiracies virtually identical in organization to Raven's, we have consistently held that when the evidence shows a key person or persons supplying drugs in one geographic location to several distributors who may or may not know of each other and may even be in competition with each other, there is nonetheless a single conspiracy.

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[1] The court held that Raven's motion for acquittal under Rule 29 was insufficient to preserve the fatal variance issue for appellate review. This is the first, and as far as counsel is aware, the only appellate decision so holding.

App. 1 at p. 3.[2]

No evidence is cited to support this conclusion of a continuous nine-year conspiracy. The Government's brief on appeal even concedes that "the trial evidence detailed greater activity in the late 1980's and mid-1995", but attempts to fill the gap by citing "evidence of Raven supplying crack cocaine to Chuck Jones (through Frazier) in 1991, to Smith (through Lewis) in 1992, and to Roussell in 1992-93" (Gov't Brief at 30). Whether viewed cumulatively or separately, these isolated transactions fall considerably short of substantial evidence upon which a reasonable juror could find, beyond a reasonable doubt, that a single conspiracy continued to operate over this six year span.

Chuck Jones-Frazier Transactions. Chuck Jones testified that he bought cocaine from Frazier in 1988-1989, and that he had three or four more deals with Frazier after Jones was released from prison in 1991. (10 R. 105-06, 112-13). There is no evidence that Raven participated directly in any of these transactions (10 R. 114). Moreover, Jones initially testified that he did not talk to Frazier about where he got his cocaine (10 R. 112). Later, Jones contradicted himself and testified (over objection) that Frazier told him his source was Raven (10 R. 116). Even this altered testimony is equivocal as to timing, however, because Jones never specified *when* Frazier made this

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[2] The court went on to grant the Government's cross-appeal of the district court's failure to enhance Raven's sentence for possession of firearms, vacating the sentence and remanding for re-sentencing. Those issues are not raised by the Petitioner here.

statement, or to which of their drug transactions (1987, 1988, or 1991) it supposedly applied. Finally, Frazier's out of court statement cannot be used as bootstrap evidence of the existence of a conspiracy in 1991, in the absence of other independent evidence that he was a co-conspirator at the time. *United States v. Burton*, 126 F.3d 666, 671 (5th Cir. 1997) (before admitting co-conspirator's hearsay statement, court must determine that conspiracy existed between declarant and defendant, and that the statement was made during and in furtherance of that conspiracy).

Lewis-Smith Transactions. Smith testified that he made two purchases of cocaine from Lewis in 1992 (R. 319). Smith asserted that Lewis's supplier was Raven, based on an unspecified occasion in which he observed Lewis deliver some crack to Amos Jones an hour after he observed Lewis' car parked in the vicinity of Raven's house. (11 R. 338). Again, this testimony is vague and equivocal as to timing, and does not specifically address Lewis' source for the 1992 transactions with Smith. Weighing against any inference that Raven was a continuous source of supply to Lewis is the testimony of the Government's own witness, confidential informant Amos Jones. According to Jones, Lewis said he did not like to deal with Raven because Raven is a "sometimer," meaning that "he might sell you the crack today and he might not tomorrow" (10 R. 227). Lewis' uncontradicted statement completely negates the existence of an ongoing agreement (i.e., a conspiracy) with Raven to supply and distribute cocaine.

Roussell-Raven Transactions. Roussell testified that he introduced himself to Raven in 1993, and purchased drugs from Raven approximately 8 or 10 times in 1993

and 1994 (10 R. 264-66). Roussell had no contact with Raven before 1993 or after 1994 (10 R. 274, 278). There is no evidence that Roussell acted as a "distributor" for Raven, that Raven "fronted" money to Roussell, or that these transactions were anything other than sporadic spot sales. There is also no evidence of an agreement between Roussell and Raven separate and apart from the sale itself which would imply a continuing relationship beyond a simple purchase.

Raven's substantial rights were prejudiced in many ways by this material variance between the single conspiracy charged in the indictment and the proof at trial of (at most) two distinct conspiracies six years apart. First, by casting the conspiracy net over a nine year span, the Government was able to take advantage of vicarious admission rules to introduce otherwise inculpatory statements by co-defendants. Second, the Government was able to avoid the statute of limitations bar for a separate prosecution of the 1987-89 drug conspiracy. *See* 18 U.S.C. § 3282 (5 year limitations period for drug offenses). Third, Raven's sentence was dramatically lengthened by inclusion of drug quantities attributable to the 1987-1989 time frame; only three percent of the crack cocaine for which Raven was held responsible came from the 1995 period. *See* Presentencing Report at 8. Finally, the aggregation of drug quantities attributable to 1987-1989 violated Raven's rights under the Ex Post Facto Clause of the U.S. Constitution, because the sentencing guidelines in effect at that time called for a lesser sentence (by two levels) than those in effect at the time Raven was sentenced.

While the outcome of the appeal below is obviously detrimental to Raven, the significance of this case extends

to federal conspiracy law as a whole, spotlighting a significant split in the circuit courts on the proof necessary to support a conspiracy conviction. As explained below, this larger significance is compelling justification for this Court to hear this case.

REASONS FOR GRANTING THE WRIT

I.

There Is A Significant Conflict Among The Circuits Whether Mere Buy-Sell Transactions Alone Can Support A Drug Conspiracy Conviction

The Fifth Circuit held that a single conspiracy exists "when the evidence shows a key person or persons supplying drugs in one geographic location to several distributors who may or may not know of each other and may even be in competition with each other." Op. at 3. In other words, a conspiracy to distribute drugs can be based on nothing more than spot sales by a single supplier to one or more purchasers for resale. This rule is contrary to that currently followed in other circuits, most notably the Seventh and Eleventh Circuits.

It is fair to say that the law of conspiracy has been evolving in recent years. Spurred by the clarion call to war on drugs, federal prosecutors have often resorted to mass trials for defendants grouped together by the "conspiracy" chord. The prosecutorial benefits of such joint trials are well known: (a) crimes otherwise barred by limitations are revived by showing a conspiracy continuing into the limitations period; (b) the co-conspirator exception to the hearsay rule expands the amount of

evidence against each defendant; (c) co-conspirators have derivative liability for substantive crimes committed by other conspirators in furtherance of the conspiracy; and (d) in drug cases, a co-conspirator's sentence is based on the variety and quantity of the drugs attributable to the entire conspiracy. *See generally United States v. Townsend*, 924 F.2d 1385, 1388 (7th Cir. 1991) ("joint trials almost always prejudice the rights of individual defendants to some degree"); Note, *Federal Treatment of Multiple Conspiracies*, 57 Col. L. Rev. 387, 397 (1957).

One of the first thoughtful opinions in response to this contemporary trend was authored by Judge Flaum of the Seventh Circuit in *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991). That case, like this one, involved a conspiracy variance claim, *i.e.*, that the indictment charged a single overarching conspiracy while the proof showed only multiple smaller conspiracies. The government reasoned that anyone who dealt with a known drug dealer must know that he is dealing with someone connected to a larger drug conspiracy, that each benefitted from dealing with the conspiracy, and that each was therefore a member of the conspiracy. The court rejected this logic:

> We think the government's argument stretches the boundaries of conspiracy law to the breaking point. . . . One may question . . . whether the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and retailer. . . . **The suppliers of a "chain" are not necessarily interested in the success of a particular retailer, or group of**

> **retailers, down the line. If the chain is characterized by sporadic dealings between independent dealers, what do suppliers care if the middlemen are able to unload the stuff further?** . . . However reasonable the so-called presumption of continuity may be as to all of the participants of a conspiracy which intends a single act, such as . . . a conspiracy to import or resell narcotics, its force is diminished as to the outer links – **buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers.** . . . [T]he viability of wholesale drug trafficking does not depend on the adherence of any single dealer. Lop off one dealer, and the wholesaler can hire another in his place.

Id. at 1391 (internal quotations and citations omitted, emphasis supplied).

In other words, once a seller completes a sale, it may be irrelevant to him whether the buyer is able to engage in other deals that do not involve him. As the *Townsend* court noted, "The buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." *Id.* at 1394. *See also United States v. Ford*, 324 F.2d 950, 952 (7th Cir. 1963) ("The relationship of buyer and seller *absent any prior or contemporaneous understanding beyond the mere sales agreement* does not prove a conspiracy. . . . In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective.").

A few years after *Townsend*, the Seventh Circuit agreed to consider *en banc* the question whether the sale of large quantities of controlled substances, without more, can sustain a conspiracy conviction. *United States v. Lechuga*, 994 F.2d 346 (7th Cir.) (*en banc*), *cert. denied*, 510 U.S. 982 (1993). Writing for the court, Judge Posner answered that question in the negative. He began by focusing on the definition of a criminal conspiracy:

> A conspiracy is not merely an agreement. It is an agreement with a particular kind of object – an agreement to commit a crime. **When the sale of some commodity, such as illegal drugs, is the substantive crime, the sale agreement itself cannot be the conspiracy, for it has no separate criminal object.** What is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself. . . . A person who sells a gun knowing that the buyer intends to \murder someone may or may not be an aider or abetter of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone.

994 U.S. at 349 (emphasis supplied). Judge Posner concluded that conspiracy requires evidence "implying something more than a series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise." *Id.* While *Lechuga* generated six separate opinions, seven of the eleven judges agreed with the majority's formulation of the distinction between a conspiratorial versus a buyer-seller relationship. The remaining judges disagreed with the majority on other grounds; none disavowed the majority's reasoning on this point.

Subsequent Seventh Circuit decisions have begun to refine this approach to drug conspiracy cases resting solely on circumstantial evidence. Four factors have been identified to determine whether the buyer-seller relationship developed into a cooperative venture: (1) the length of affiliation, (2) the established method of payment, (3) the extent to which transactions were standardized, and (4) the demonstrated level of mutual trust. *United States v. Hach*, 162 F.3d 937, 943 (7th Cir. 1998). Had those factors been applied here, Raven's conviction of a nine year conspiracy with various other dealers would surely have been overturned.

Other circuits are in accord with the Seventh Circuit's approach. The Eleventh Circuit has consistently rejected conspiracy charges based solely on buy-sell transactions. *United States v. Dekle*, 165 F.3d 826, 830 (11th Cir. 1999); *United States v. Solomon*, 686 F.2d 863, 876 (11th Cir. 1982). Judge Friendly of the Second Circuit expressed a similar view in *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) ("a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction"). Chief Judge Becker of the Third Circuit recently urged that circuit to reconsider and adopt the Seventh Circuit's approach to buyer-seller relationships in the conspiracy context. *United States v. Gibbs*, 190 F.3d 188, 199 n.3 (3d Cir. 1999).

The opinion below reflects the over-simplified approach to drug distribution conspiracy cases that the Fifth Circuit has expounded elsewhere in more detail. For

example, in *United States v. Morris*, 46 F.3d 410 (5th Cir. 1995), the court applied a three-part test to determine the existence of a single drug distribution conspiracy: (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in various dealings. Interpreting these criteria in an admittedly "expansive" manner, the court found a common goal in the desire of everyone involved to profit from the illicit purchase and sale of cocaine; the nature of the scheme was such that if the sellers discontinued selling, the purchasers could no longer buy, and vice versa; and that the bulk transfers of cocaine in themselves "evince a knowledge that such cocaine would be sold or delivered to other parties." It is submitted that such a test will yield a "conspiracy" in virtually every case involving a transaction of any but minute quantities of drugs. Such an expansive approach to conspiracy doctrine is directly contrary to that staked out by the Seventh Circuit in *Townsend*, as the *Morris* court admitted. 46 F.3d at 417 n.3.

This Court should grant certiorari in this case to resolve this significant difference of opinion among the circuits concerning this important area of the criminal law.

II.

The Fifth Circuit's Approach To The Buyer-Seller Relationship In Drug Conspiracy Cases Is Contrary To Relevant Decisions Of This Court

This Court has not directly addressed this aspect of criminal conspiracy law in some time. Nevertheless, the

decision below is contrary to the extant teachings of this Court in this area.

More than half a century ago, Justice Jackson cited the development of the law of conspiracy as an illustration of Justice Cardozo's maxim of "the tendency of a principle to expand itself to the limit of its logic." *See Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Recognizing the potential for prejudice to individual rights posed by mass trials, the Court attempted to impose some curbs to the expansion of conspiracy law in *Kotteakos v. United States*, 328 U.S. 750 (1946). In that case the indictment charged a single conspiracy to submit fraudulent insurance applications to the FHA. Thirteen defendants were tried together. The proof showed more than one such conspiracy among separate groups of defendants having no connection to one another other than the use of the same broker to process the fraudulent applications. This Court reversed the defendants' convictions, even though the evidence was sufficient to establish that each defendant had participated in separate but smaller conspiracies than alleged in the indictment. According to the Court, Congress has not "intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all." 328 U.S. at 773. The Court eloquently elaborated upon the dangers to our traditional system of justice inherent in conspiracy trials involving multiple defendants:

> They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies

> the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

328 U.S. at 773.

In *United States v. Falcone*, 311 U.S. 205, 208 (1940), the Supreme Court overturned the conspiracy conviction of those who furnished supplies to an illicit distiller where the evidence showed no more than knowledge that their materials would be used for illicit distilling. The Court thereby affirmed the Second Circuit decision authored by Judge Learned Hand, which contains the following oft-quoted passage on criminal conspiracy:

> It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; **he must in some sense promote their venture himself, make it his own, have a stake in its outcome.** The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. **That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.** We may agree that morally the defendants at bar should have

> refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills.

United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (emphasis supplied).

And in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), the Court considered the conviction of a corporation for conspiracy to illegally distribute narcotics. The corporation sold morphine sulphate to a particular doctor in vast quantities, so frequently and over so long a period of time that it must have known the doctor was not dispensing the amounts received in a lawful manner. The Court reaffirmed the holding of *Falcone* "that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally." 319 U.S. at 709. To establish the requisite intent to join a conspiracy, the evidence of knowledge must be clear, not equivocal. "[C]harges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in [*Falcone*], was called a dragnet to draw in all substantive crimes." 319 U.S. at 711. Applying those principles, the Court affirmed the conviction based upon the prolonged cooperation between the parties, and the corporation's active incitement and stimulation to further purchases, by bargain counter discounts and the like.

These venerable cases stake out fairly clear limits on the reach of federal conspiracy law, limits which have been transgressed by the court below. Cases like *Falcone* and *Direct Sales* drew a critical distinction between a

conspiratorial agreement and a mere buyer-seller transaction. The Fifth Circuit decision below effectively erases that distinction. *Kotteakos* established that the mere presence of a single key man involved in similar transactions with different individuals does not justify a finding of a single overarching conspiracy. The Fifth Circuit's holding that a single supplier's dealings with multiple customers supports a conspiracy conviction is directly at odds with this teaching.

It is time for this Court to revisit this aspect of conspiracy law. In the push to join the politically popular "war on drugs," some courts of appeal have ignored this Court's carefully considered cautions on the conspiracy doctrine. Thus, conspiracy convictions are upheld on nothing more than inference piled upon inference, without clear and unequivocal evidence of a conspiratorial agreement. Judge Hand's warning of the "opportunities of great oppression" when so many prosecutors are casting the dragnet of conspiracy is just as timely today as ever. By the use of this device, Michael Raven has been convicted of criminal conduct which was otherwise time-barred, based on evidence otherwise inadmissible, and received a sentence nearly double than that which he would otherwise have received. Undoubtedly, many other conspiracy defendants have suffered a similar fate under the expansive interpretation of conspiracy law currently applied in the Fifth Circuit. Many more defendants will continue to suffer such injustice until this Court reaffirms the boundaries on conspiracy law marked out many decades ago.

CONCLUSION

For the foregoing reasons, Petitioner Michael Raven requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

STEPHEN W. SMITH
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

Counsel of Record for Petitioner Michael Dwight Raven

Of Counsel:

FULBRIGHT & JAWORSKI L.L.P.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40635
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant,

versus

MICHAEL DWIGHT RAVEN, also known as Red,

Defendant-Appellant Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas
(95-CR-10-1)

(Filed Aug. 24, 1999)

Before POLITZ, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Michael Dwight Raven appeals his conviction for conspiracy to possess with the intent to

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

distribute cocaine and cocaine base, and he appeals his sentence as well.

Raven argues that the indictment charged that he, Smith, Frazier, and Lewis conspired to possess with intent to distribute five kilograms of cocaine and 50 grams of crack cocaine, beginning on or about the middle of 1987 and continuing until the date of indictment, November 15, 1996, but that the evidence fell short of establishing a single conspiracy of nine years' duration. Additionally, he argues that the government's proof failed to establish any agreement between the four named defendants.

Raven's general motion for judgment of acquittal pursuant to Fed. R. Crim. P. Rule 29 did not preserve his specific claim of a fatal variance between the indictment and the evidence at trial, which he has raised for the first time on appeal. We therefore we [sic] review his claim for plain error. *See United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc).

The evidence established that Raven was running a crack cocaine distribution ring in a concentrated area around Washington Street in Texas City, Texas, from 1987 until his arrest in 1995. Despite Raven's attempt to create a large gap in the timeline of events, the testimony of the various conspirators and cooperating individuals shows that Raven supplied crack cocaine for redistribution continuously from 1987 to 1995. The evidence does not show a break from 1989 to 1995 in the drug distribution activities of Raven and his conspirators as he claims. In cases involving drug distribution conspiracies virtually identical in organization to Raven's, we have consistently held

that when the evidence shows a key person or persons supplying drugs in one geographic location to several distributors who may or may not know of each other and may even be in competition with each other, there is nevertheless a single conspiracy. *See United States v. Morgan*, 117 F.3d 849, 858-59 (5th Cir.), *cert. denied*, 118 S. Ct. 454 (1997); *United States v. Payne*, 99 F.3d 1273, 1279-80 (5th Cir. 1996); *United States v. Morris*, 46 F.3d 410, 416 (5th Cir. 1995); *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir. 1994). Raven has not shown a variance between the proof at trial and the indictment.

Raven also argues that the government's proof failed to establish any agreement between the four named defendants, contending that the defendants were never placed together during a single transaction or meeting. We disagree with his analysis. The evidence supporting the existence of a single conspiracy to distribute drugs also supports the existence of an agreement between the defendants to distribute cocaine. *Morris*, 46 F.3d at 416.

Raven argues that the material variance infected the sentencing phase of his trial. He states that he was sentenced in error to 420 months based on sentencing findings calculating the quantity of drugs involved from 1987 to 1995. He argues that the district court's finding that he headed an organization comprising five or more participants was erroneous. As Raven's sentencing arguments are predicated on his underlying argument that the evidence does not establish a single conspiracy from 1987 to 1995, our dismissal of his basic argument leaves his sentencing arguments without foundation.

The government cross appealed, arguing that the district court clearly erred by misappling [sic] U.S.S.G. § 2D1.1(b)(1) and thereby failing to increase Raven's offense level by two for possession of a firearm. The government insists that the district court incorrectly applied a *Bailey*[1] analysis to deny the increase, contending that application of *Bailey* is inapt, and that, on the basis of the evidence, it was not clearly improbable that the weapon was connected with the offense.

Section 2D1.1(b)(1) provides for a two-point upward adjustment in the offense level in a drug crime if a dangerous weapon was possessed. Application Note 3 states that the adjustment "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D1.1, comment (n.3); *United States v. Mitchell*, 31 F.3d 271, 277 (5th Cir. 1994). The district court's finding is reviewed for clear error. *United States v. Fierro*, 38 F.3d 761, 774 (5th Cir. 1994).

The government must demonstrate that "a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant. Generally, the government must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored." *United States v. Eastland*, 989 F.2d 760, 770 (5th Cir. 1993) (internal citations and quotations omitted); *see also United States v. Hooten*, 942 F.2d 878, 882 (5th Cir. 1991). "It is not necessary for possession of the weapon to play an integral role in the offense or to be

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[1] *Bailey v. United States*, 516 U.S. 137 (1995).

sufficiently connected with the crime to warrant prosecution as an independent firearm offense." *United States v. Villarreal*, 920 F.2d 1218, 1221 (5th Cir. 1991).

The district court clearly did apply a *Bailey* analysis. Although the court did not mention *Bailey* by name at sentencing, it did during the trial when the evidence of the presence of the firearms was being presented. The district court mistakenly stated ___ and repeated the mistake at sentencing ___ that *Bailey* addressed itself to sentencing. Unfortunately, it did not.

Bailey addresses a substantive offense rather than sentencing, holding that a conviction for the use of a firearm under 18 U.S.C. § 924(c)(1) requires proof of the active employment of a firearm during the commission of the underlying offense. 516 U.S. at 143-44. *Bailey* analyzes the construction of "use" of a firearm under § 924(c) only; it is not controlling in an interpretation or application of the sentencing guidelines. *United States v. Flucas*, 99 F.3d 177, 179 (5th Cir. 1996); *United States v. Castillo*, 77 F.3d 1480, 1499 n.34 (5th Cir. 1996). The district court's reasoning would render § 2D1.1(b)(1) useless because, if a defendant were convicted under § 924(c), the sentencing court could not apply the § 2D1.1(b)(1) adjustment under the guidelines. *See* § 2K2.4, comment (n.2).

The district court misapplied the guidelines by applying an incorrect analysis of the necessary relationship between a weapon and a drug offense. The correct standard is whether it is "clearly improbable" that the weapon was connected with the offense. § 2D1.1, comment (n.3); *Mitchell* 31 F.3d at 277. We therefore vacate

Raven's sentence and remand this case for resentencing in accordance with this opinion.

CONVICTION AFFIRMED; SENTENCE VACATED, AND CASE REMANDED FOR RESENTENCING.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40635

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant,

versus

MICHAEL DWIGHT RAVEN, also known as Red,

Defendant-Appellant Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 95-CR-10-1

ON PETITION FOR REHEARING

(Filed Oct. 12, 1999)

Before POLITZ, JOLLY, and WIENER, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

FOR THE COURT:

/s/ JACQUES L. WIENER
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE